Office-Supreme Court, U.S.
FILED
JUN 16 19
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] /85

ERNEST JOSEPH GIBAS, DONALD DOWD FULTON and MICHAEL EMMETT BYRNE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RICHARD E. GORMAN
One North LaSalle Street
Chicago, Illinois
Attorney for Petitioners

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
OPINIONS BELOW	10a
JURISDICTION	1
QUESTIONS PRESENTED	2
STATUTES INVOLVED	1a
STATEMENT OF THE CASE	3
The indictment	3
The evidence presented at the trial	5
Instructions to the jury	12
Verdict and judgment	14
Proceedings in the Court of Appeals	14
REASONS FOR GRANTING THE WRIT	16
CONCLUSION	25
APPENDIX A—Statutes Involved	1a
APPENDIX B—Judgments in the United States District Court	4a
APPENDIX C—Opinion of the Court of Appeals	10a
APPENDIX D—Judgment of the Court of Appeals	17a
APPENDIX E—Compilation of Evidence in Case by Counts	18a

CITATIONS.

CASES:

Brotherhood of Carpenters v. United States, 330 U.S. 395, 408-409	22
Burkhart v. United States, 6th Cir., 1926, 137 2d 841, 842	20
Call v. United States, 4th Cir., 1959, 265 F. 2d 167, 172	20

PAGE

Carothers v. United States, 5th Cir., 1947, 161 F. 2d 718, 722 22

Ah Ming Cheng v. United States, 5th Cir., 1962, 300 F. 2d 202 20

Dinger v. United States, 8th Cir., 1928, 28 F. 2d 548, 551 22

Direct Sales v. United States, 319 U.S. 703, 711 20

Duke v. United States, 5th Cir., 1956, 233 F. 2d 897, 901-902 20

Estep v. United States, 10th Cir., 1943, 140 F. 2d 40, 45 20

Fulbright v. United States, 8th Cir., 1937, 91 F. 2d 210, 213-214 20

Ingram v. United States, 360 U.S. 672, 677-681 20

Jones v. United States, 10th Cir., 1958, 251 F. 2d 288, 294 20

Ong Way Jong v. United States, 9th Cir., 1957, 245 F. 2d 392, 394 20

Lambert v. California, 355 U.S. 225, 227-330 22-23

Mazurka v. United States, 9th Cir., 1939, 100 F. 2d 958, 961-962 20

United States v. Dubrin, 2nd Cir., 1937, 93 F. 2d 499, 503-504 20

United States v. Falcone, 311 U.S. 205, 210 20

United States v. Hines, 2d Cir., 1958, 256 F. 2d 561, 564 22

Van Tress v. United States, 6th Cir., 1923, 292 Fed. 513, 520 20

Ventimiglia v. United States, 4th Cir., 1957, 242 F. 2d 620 24

PAGE

STATUTES:

Federal Criminal Conspiracy Act, 62 Stat. 701, 18 U.S.C. 371 39

Labor Management Relations Act Of 1947, 61 Stat. 157, 29 U.S.C. 186 19

Section 302 (a) 1a

302 (b) 1a

302 (c) 1a

302 (d) 1a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No.

ERNEST JOSEPH GIBAS, DONALD DOWD FULTON and MICHAEL EMMETT BYRNE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Ernest Joseph Gibas, Donald Dowd Fulton and Michael Emmett Byrne respectfully pray that a writ of certiorari issue to review the judgment of the Seventh Circuit entered in the above case on March 19, 1962.

OPINIONS BELOW.

The opinion of the court below (Appendix C, p. 10a, *infra*) is reported at 300 F. 2d 836. The district court did not hand down any opinion.

JURISDICTION.

The judgment of the court below was entered on March 19, 1962 (Appendix D, p. 17a, *infra*). A petition for rehearing duly filed by petitioners was denied on April 17, 1962. On May 14, 1962, the time within which to file a petition for a writ of certiorari was extended to and

including June 16, 1962 by an order signed by Mr. Justice Clarke. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

QUESTIONS PRESENTED.

As to the petitioner, Michael Emmett Byrne:

1. Can a conviction for conspiracy under 18 U.S.C. 371 and for substantive offense stand as to one defendant where the court of appeals refused to review the sufficiency of the evidence to go to the jury on the only substantive charge against him because of the existence of a concurrent sentence on the conspiracy count and there is no evidence that he knew of, or participated in, any of the conduct of the other defendants which constitutes either the conspiracy or the substantive offense?

As to all of the petitioners:

2. Whether the guarantee of a trial by jury set forth in Article 3, Section 2, Clause 3, of the Constitution of the United States and in the Sixth Amendment thereto or proper procedure is violated when the trial judge directs the jury in a federal criminal trial to find certain issues of fact against the defendants on the ground that the evidence in their favor was insufficient.

3. Whether the due process clause of the Fifth Amendment to the Constitution of the United States or Section 302 (b) and (d) of the Labor Management Relations Act (29 U.S.C. 186 (b) and (d)) is violated by applying such section in a manner which renders entirely innocent conduct criminal in that the trial court instructed the jury so that the defendants could be convicted without either knowledge of the law or evil motive.

4. Whether the language of Section 302 (b), which limits its prohibition to "representatives of employees" receiving payment from the "employer of such employees," was properly construed by the trial court when it instructed the jury that the contractor making the payment did not need to have in his employ at the time of the payment any person represented by the defendants.

STATUTES INVOLVED.

The pertinent provisions of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186 and of the Federal Criminal Conspiracy Act, 62 Stat. 791, 18 U.S.C. 371 are set forth in Appendix A, *infra*, p. 1a.

STATEMENT OF THE CASE.

Each of the petitioners, Gibas, Fulton and Byrne, hereinafter sometimes referred to as defendants, was prosecuted criminally under an indictment containing 50 counts, the first charging a conspiracy in violation of Section 371, Title 18, United States Code (App. p. 1a[1]) and the other 49 counts charging substantive violations of Section 302 (b) of the Labor Management Relations Act (App. 8-65).

The indictment.

The first count charged a conspiracy between the defendants and Tagney and "diverse other persons" whose names were unknown, to be representatives of members of Local 136 of the Machinery, Movers, Riggers and

[1] Nine copies of each of the two appendices used below have been filed here. The volume designated on the cover "Appendix," which contains the pleadings, transcript of testimony and judgment in the district court, is hereinafter referred to by the designation "App." The volume designated on the cover "Exhibit Volume," which contains photostats of exhibits, is hereinafter referred to by the designation "Photo."

Machinery Erectors (hereinafter called Local 136) and to receive and accept money from employers of members of Local 136 (App. 3-6). It was alleged that Tagney, prior to his death on August 10, 1953, was the president of Local 136; that Gibas was business manager and financial secretary-treasurer of Local 136; and that Fulton and Byrne were business representatives of Local 136 (App. 4-5).

The first count set forth the names of various of the contractors from whom the defendants allegedly conspired to receive money and alleged that such contractors were engaged in the machinery moving, erecting and dismantling industry. (App. 3).

Eighteen alleged overt acts were set forth, consisting of conversations and receipt of money from employers (App. 6-8).

As to the defendant Gibas, the indictment originally contained 42 substantive counts (App. 8-26, 33-62), 6 of which were dismissed by the government (App. 67, 389, 402-403) and two more of which resulted in a not guilty verdict (App. 538), leaving 34 substantive counts on which the defendant Gibas was convicted and sentenced (App. 538, 550-551). As to the defendant Fulton, the indictment contained 6 substantive counts (App. 26-32, 63-64), on all of which he was convicted and sentenced (App. 538, 554-555). As to the defendant Byrne the indictment contained one substantive count (App. 64-65), on which he was convicted and sentenced (App. 538, 553).

All the substantive counts were identically worded except for the name, description and address of the employer, the name of the defendant, the date and the amount of payment alleged (App. 8-65). Thus, each of the sub-

stantive counts of the indictment, being counts 2 through 50, contained four paragraphs, the first paragraph identifying the employer as to name and address and alleging the interstate character of his business; the second paragraph alleging that at all times mentioned certain of his employees were members of Local 136; the third paragraph alleging that at all times mentioned the named defendant was a representative and official of Local 136; and the fourth paragraph alleging that on a specified date the named defendant "did knowing full well all of the foregoing, unlawfully, wilfully and knowingly receive and accept" from the named employer a specified sum of money "in violation of Section 186 (b), Title 29, United States Code" (App. 8-65).

The evidence presented at the trial.

The evidence presented by the government consisted mainly of a large number of checks and check stubs, accompanied in some instances by accounting records or cash disbursal memoranda. In most instances the check was made payable to "Cash" (*e.g.*, Gov't Exh. Nos. 33-1, 34-1, 35-1, 36-1, 1-513, Photo. 1, 3, 5, 7, 9), although in a few instances the check was made payable to some payee, such as "Local 136, Christmas Party" (Gov't Exh. No. 1-712, Photo. 58). In no case was the check made payable to or endorsed by any of the defendants. Most of the check stubs, cash disbursal memoranda or accounting records had written thereon Gibas' name with a notation of some such purpose as "Comm. on Dulane job" (Gov't Exh. No. 1-618, Photo. 32)[2].

---

[2] As Appendix E, p. 18a, infra, we have attached a chart showing in column 4 thereof the purpose of each payment to the extent that the exhibits or testimony contained any explanation, arranged as to each defendant by numerical order of the counts.

The government called as its witnesses the various contractors or contractors' employees who signed or made out the checks and had the witness identify each of the checks drawn by him, testify that he handed the check or its cash proceeds in whole or in part to either Tagney or Gibas (and in nine instances to Fulton, none to Byrne) or mailed or otherwise took it to the union office, and testify briefly as to the nature of the business in which the witness was engaged and that in the course of that business members of Local No. 136 were from time to time employed. Then by cross-examination counsel for the defense sought to elicit from the government witness testimony which would disclose the reason for the payment, the number of members of Local No. 136, if any, employed in the business at the time of the payment and the number and extent of interstate transactions, if any, during the years involved. None of the defendants testified.

None of the contractors involved was directly a party to any collective bargaining agreement with Local No. 136, with the possible exception of Standard Cartage Company whose owner "couldn't be sure" whether he was a party to such a contract (App. 310-311).

Only one of the employers was indirectly a party to such a contract at any time here relevant. That was Helders Motor Service Company, Chicago, Illinois, which in 1956 and 1957 was a member of an employers association, namely, the Chicago Movers and Erectors Association, which had a contract with Local 136 (App. 211). Helders kept only one member of Local 136 on its payroll steadily and called the union hiring hall for temporary employees whenever he needed additional riggers (App. 203, 208).

All of the contractors maintained cordial relations with Local 136. There was no evidence in the record even suggesting any hostility between any of the contractors here involved and Local 136. The contractors called the hiring hall of Local 136 from time to time and hired on a daily basis such riggers as they needed (App. 99-101, 128, 162, 243, 309-310). In the course of such dealings, Tagney, Gibas and Fulton, to increase the employment opportunities for the riggers registered at the hiring hall of Local 136, engaged in a variety of business transactions with various of the contractors in the course of which the contractors voluntarily made payments to Tagney, Gibas and Fulton, such as the repayment of money loaned to buy machinery (App. 76-80, 84) and commissions for securing jobs for the contractor (Photos. 15, 16, 17, 18, 19, 23, 25, App. 120, 122-123, 130-131, 134, 141, 248-249, 249-254, 257-258). There is no evidence of any coercion or that any of the payments were involuntary.

The government offered no theory as to the payments. It merely produced the checks covering a wide range of dealings, all voluntary, and insisted irrespective of the circumstances any payment was *ipso facto* a violation of Section 302 (b) of the Labor Management Relations Act. To the extent that it is possible to classify the payments they fall within the following groups.

Services performed by Gibas for Masek. All of the checks which Government Witness Frank Masek gave to Gibas during the five years preceding the date of the indictment, except four, were for commissions for securing jobs for Frank Masek, doing business as F. Masek Machinery Movers, Chicago, Illinois. Government Witness Masek testified that Gibas would recommend to businesses which were looking for someone to move machinery that

they give the contract to Masek and when Masek got a contract as the result of such a recommendation by Gibas, he paid Gibas a commission for his services in securing the contract for Masek (App. 248-253, 260-262, 265). Masek's testimony in this regard was confirmed by the notation on the stubs of the checks which showed the word "commission" or "comm." (Gov't Exh. Nos. 39-2, 40-2, 41-2, 42-2, 43-2, 49-2, 1-612, 1-613, 1-618, 1-619, 1-632, 1-636, 1-638, 1-642, 1-648, 1-649, 1-657, 1-660, 1-663, 1-670, Photo. 15-19, 25, 30-33, 36, 38, 40, 42, 45-46, 49, 51, 53, 55), often accompanied by a reference either on the check stub (Gov't Exh. Nos. 1-618, 1-619, 1-632, 1-636, 1-663, Photo. 32-33, 36, 53) or on the cash disbursal memoranda (Gov't Exh. Nos. 47-1, 49-2, 1-608, 1-613, 1-619, 1-627, 1-633, 1-637, 1-643, 1-646, 1-653, 1-658, 1-661, 1-664, 1-671, Photo. 23, 25, 29, 33, 35, 37, 39, 43-44, 48, 50, 52, 54, 56) to the particular job by name, on which the commission was paid (App. 253-265). Government Witness Masek testified that in all instances where the check stub or cash disbursal memorandum bore his name and the notation "comm." or "commission," the check drawn on that particular occasion was actually in payment for a commission earned by Gibas in getting Masek business (App. 248-249).

Services performed by Fulton for Masek. In identifying a check dated April 6, 1954, payable to cash in the sum of $50 (Gov't Exh. 49-1) Government Witness Masek testified that prior to the time he made out this check and handed it to Gibas for the commission on securing the Hebol Manufacturing job, Gibas had told him that Fulton deserved credit for helping Masek get the job and should share in the commission (App. 222-223, 252-253). The entries made on the cash disbursal memorandum (Gov't Exh. No. 49-2, Photo. 25) as filled out by Govern-

ment Witness Masek at the time showed that the commission was to go to Fulton.

Masek's payment of dues for Newman and Lesco. The four checks which Government Witness Masek testified that he gave to Gibas which were not for commissions, were, as indicated on the check stubs and as explained by Masek in his testimony, in four instances for the union dues of Robert Newman, Masek's foreman (App. 249-250, 255, 258, Gov't Exh. Nos. 44-2, 45-2, 46-2, 48-2, Photo. 20-22, 24), and in one instance also included union dues of one of Masek's employees, Lesco (App. 256-258, Gov't Exh. No. 48-2, Photo. 24). Government Witness Masek testified that his foreman, Robert Newman, in each instance owed the union dues asked Masek to pay the dues for Newman as an advance or loan to Newman and then Newman repaid Masek (App. 256-258). The same was true in the one instance of a check covering also Lesco's union dues (Gov't Exh. No. 48-2, Photo, 24, App. 256-257).

Payments arising out of Tagney loan to Tucker. Government Witness William N. Tucker, who prior to August 1955, did business as M. Lange, and from August 1955 on was president of M. Lange, Inc. (App. 72), admitted on cross-examination that the payments he made to Gibas grew out of a claim of Tagney that he owed a share of the business because he lent Tucker the money to buy the machinery with which to start his business (App. 104, 76-80, 84). Tagney had in fact loaned the money with which Tucker started his business (App. 104). Government Witness Tucker volunteered the information on direct examination that he "went along" with Tagney's proposal to sell out his interest in Tucker's business for the immediate payment of one thousand dollars ($1,000) in cash plus regular monthly payments of $30 per month thereafter (App. 76-77).

Services performed by Gibas for Ross. From the testimony of Government Witness John A. Ross it appears that all of his payments to Gibas were made as part of an arrangement whereby Gibas helped in securing contracts for Ross and Company (App. 120, 122-123, 130-131, 135, 141).

Services performed by Fulton for Koshen. From the testimony of Government Witness Walter Koshen, Sr., president of Koshen Machinery Movers and Erectors, Incorporated, it appears that the only payment he made to Gibas was for his services in hunting up a former foreman, Hank Peters; and securing his release from his then job so he could serve as foreman for Koshen on a rush job he was going to do (App. 181-182).

Donations to fund used to pay expenses of Christmas party for children of members of Local 136: The evidence showed that in a number of instances the payments allegedly made to defendant Gibas were not in fact payments to him at all but rather that he acted at most as the intermediary to convey the payment to some other payee. One group of such payments was in fact made to a Christmas Party Committee, which collected and used all the money allegedly paid to Gibas for a Christmas party as intended and directed by the respective donors (Photo. 11, 57, 58, App. 111-112, 168-173, 158-159, 276-277, 281-282, 473-477, 481-484).

Payments to Local 136 in settlement of grievance. The testimony in support of the only charge in the indictment that the defendant Byrne received any payment from any employer (App. 7, 65) showed at most that Byrne phoned Government Witness Frank Masek and complained that Masek was working short-handed on a job at Mall Tool and would have to get more men on the job (App. 224-225). Masek volunteered on direct examination as a gov-

ernment witness that he was in fact working short-handed on the job and told Byrne over the phone that he "would take care of it with Ernie Gibas" (App. 224). Government Witness Masek testified that he did straighten the matter out by giving Gibas the check dated December 10, 1957 payable to cash in the sum of $100 (Gov't Exh. Nos. 50-1, 50-2, Photo. 26, 27, App. 223-225). Government Witness Masek testified he could not say that this check was ever received by Byrne (App. 255). The check was endorsed "Pay to the order of Peoples National Bank of Chicago for deposit only Machinery, Riggers & Machinery Erectors Union Local 136" (Gov't Exh. No. 50-1, Photo. 26). There was no evidence that Byrne ever knew of the check or received any part of it.

Government Witness Rodseth testified that the check drawn on his firm dated November 1, 1953 was cashed and the proceeds used to pay a fine to Local No. 136 (App. 163-165, Gov't Exh. No. 2-1, 2-2).

Aside from the innocent character of the payments, in some cases no member of Local 136 was at the time of the payments employed by the contractors. As to the payment allegedly made by Koshen to Fulton, the undisputed testimony of Government Witness Koshen establishes that he did not at the time of the alleged payment employ, and at no time prior thereto had, employed any member of Local No. 136, but in fact employed his first employee obtained from Local No. 136 several days after the alleged payment (App. 177-183, 187, 191, 196-197).

As to numerous other contractors there was no testimony that they had members of Local No. 136 in their employ at the time of the payment. As to Masek (App. 239-241, 246, 249-250, 256, 261), Rodseth (App. 162, 165-166), Helders (App. 203, 208) and Gorter (App. 302, 307-

309, 316), the evidence showed such sporadic and intermittent employment of riggers as to leave no basis for concluding that on the dates of the payments they employed members of Local No. 136.

Instructions to the jury.

Counsel for the defendants requested the trial court to instruct the jury as to the five types of payments to unions or their agents which are excepted from Section 302 (b) by Section 302 (c). (Defendants' Instruction D-8, App. 502-503.) This was refused by the court (App. 486). Instead the court gave a revised version of Government's tendered Instruction No. 15. As tendered by the Government its Instruction No. 15 read:

> "The Court's understanding of the issues and his recollection of the evidence is that none of these five exceptions is applicable to the fact situation that is presented here."

The Court stated (App. 494):

> "The Court will give Government's tendered Instruction No. 15 as revised."

Government's Instruction No. 15, as revised by the court, is set out as follows:

> "There was no evidence presented at this trial indicating that any payment made by any employer was of the nature of any of said statutory exceptions."

Defendants' counsel objected to this instruction and stated (App. 496):

> "It seems to me that this is an invasion of the province of the jury, and furthermore, that it is not a matter of law to be ruled upon by the Court."

The defense requested an instruction on *mens rea* (Defendants' Instruction D-18, App. 510) which the court refused (App. 486) and instead gave the following instruction (App. 530):

> "The word 'willfully' means that the person knowingly and intentionally committed the acts which constitute the offenses charged.
>
> "The word 'knowingly' imports only a knowledge of the existence of the facts in question, when those facts are such as to bring the act or omission within the prohibition of the law. The word does not require as a part of its meaning that there be any knowledge or awareness that such act or omission is in fact prohibited by law."

The defendants duly excepted to this charge (App. 488-492, 494).

The defense requested an instruction that payments to come within Section 302 must be made by an employer with two or more employees (Defendants' Instruction D-11, App. 506). The court refused to give this instruction (App. 486). In this same connection, the defense requested an instruction that a wilful violation of Section 302 could not be found if at the time of the alleged payment to a defendant the defendant did not represent any employees of such employer or such employer did not employ any employees represented by the defendant (Defendants' Instruction D-12; App. 507). The court refused to give this instruction (App. 486). Instead the court instructed the jury (App. 527):

> "It is not necessary that the various companies have employees who were members of the union at the actual moment of receipt of the money."

The defendants duly excepted to this charge (App. 490, 496).

Verdict and judgment.

The jury found all the defendants guilty on the conspiracy count, the defendant Gibas guilty on 34 of the substantive counts and not guilty on two, the defendant Fulton guilty on six of the substantive counts and the defendant Byrne guilty on the one substantive count naming him (App. 538).

The court sentenced the defendant Gibas to imprisonment for a total of six years and the payment of fines totalling $8,000 (App. 550-551), the defendant Fulton to imprisonment for one year and the payment of fines totalling $3,000 (App. 554-555) and the defendant Byrne to imprisonment for one year and the payment of a fine of $1,000 (App. 553). Judgments in accordance with the sentence were entered on January 12, 1961 (App. 556-562). The respective counts on which the sentences of imprisonment run concurrently and the respective counts as to which fines were imposed, together with references to the evidence relevant to each count have been set forth in a chart designated Appendix E and attached at the end of this brief (p. 18a, *infra*).

Proceedings in the Court of Appeals.

Upon appeal to the United States Court of Appeals for the Seventh Circuit, each of the defendants made the following, among other, contentions: Each defendant was deprived of his right to a trial by jury in violation of Article 3, Section 2, Clause 3 of the Constitution of the United States and the Sixth Amendment thereto, by the directions of the trial court to the jury that there was no evidence that the payments fell within any of the five classes excepted from Section 302 (b)[3]. Each defendant

[3] See pp. 33, 42-54, Brief of Appellants in the Court of Appeals, a certified copy of which has been filed with the Clerk of this Court.

was deprived of due process of law in violation of the Fifth Amendment to the Constitution of the United States in that Section 302 (b) and (e) of the Labor Management Relations Act renders entirely innocent conduct criminal, as construed by the trial court in instructing the jury so that defendants need not have either knowledge of the law or evil motive to be guilty of a wilful violation thereof[4]. The trial court committed reversible error in instructing the jury so that neither knowledge of the law nor evil motive was necessary[5] nor employment of any member of Local No. 136 at the time of the payment[6]. With respect to the counts as to which the government failed to produce any evidence that the contractor had at least two employees who were members of Local No. 136 at the time of the payment, the trial court should have directed a verdict of acquittal for the defendants[7]. There was no evidence that the defendant Byrne ever received any payment or knew that anyone else received, or conspired to receive any payment, or participated in any conspiracy for the receipt of payments by himself or anyone else and hence the trial court erred in failing to direct a verdict of acquittal as to the defendant Byrne[8].

The court of appeals affirmed the judgment below. It held that defendants had not properly objected to the instructions to the jury that there was no evidence that any of the payments fell within the classes excepted (p. 13, *infra*), but in any event the trial judge was correct in his determination that "there was no evidence which required the submission of that question to the jury" (p.

---

[4] **Idem**, pp. 34, 54-63.
[5] **Idem**, pp. 35, 63-74.
[6] **Idem**, pp. 36, 74-80.
[7] **Idem**, pp. 38, 87-88.
[8] **Idem**, pp. 38, 84-87.

12, *infra*). With respect to defendants' contention that the trial court improperly refused to charge the jury that either knowledge of the law or evil motive was required to convict, the court of appeals again ruled that defendants had not preserved a proper objection below, but that in any event neither knowledge of the law nor evil or bad motive is necessary (p. 15, *infra*). The court of appeals ruled there was no need for proof that the contractor employed at least two members of Local No. 136 at the time of the payment and that the trial court did not err in instructing the jury that the contractor did not need to have a member of Local No. 136 in his employ on the date of the payment (p. 15, *infra*).

The court of appeals ruled that it was unnecessary for it to determine whether there was any evidence that the defendant Byrne received the only payment with which the indictment charged him, as the fine and imprisonment imposed on the conspiracy count ran concurrently on the only substantive count against him (p. 15, *infra*).

REASONS FOR GRANTING THE WRIT.

1. As to the defendant Byrne this case presents such a flagrant abuse of the conspiracy doctrine as to require review and correction by this Court. Here there was not a scintilla of evidence that Byrne ever received any payment from any contractor nor was there a scintilla of evidence that Byrne knew any other defendant had either received, or conspired to receive, any payment from any contractor. The court below evidenced its awareness of the absence of any proof to show that Byrne received any payment. In its opinion the court below expressly found "it unnecessary to consider the contention that there is no evidence that Byrne received the payment referred to in Count 50" (p. 16, *infra*). The court of appeals

explained that its failure to consider this contention rested on the fact that the sentence Byrne received on Count 50 was concurrent with the sentence on the conspiracy count. But the court of appeals overlooked the fact that the conspiracy count did not charge Byrne with the receipt of any money aside from that charged in Count 50. If the evidence was insufficient to go to the jury on Count 50 it was equally insufficient to support the conspiracy count.

There were only two witnesses who made any mention of Byrne in their testimony: Frank Masek and Walter Koshen, Sr. Count 50 (App. 64-65) charged Byrne with receiving $100 from Masek on December 9, 1957. Masek testified that he had received a phone call from Byrne complaining that Masek was working short-handed on a job at Mall Tool and would have to get more men on the job (App. 224-225). Masek volunteered on direct examination as a government witness that he was in fact working short-handed on the job and told Byrne over the phone that he "would take care of it with Ernie Gibas" (App. 224). Masek testified that he did settle the complaint with Gibas and in doing so he gave Gibas a check dated December 10, 1957, payable to cash in the sum of $100 (Gov't Exh. Nos. 50-1, 50-2, Photo. 26, 27, App. 223-225). Government Witness Masek admitted on cross examination that he had no knowledge whatsoever that this check or any of its proceeds were ever received by Byrne (App. 255). The check as returned to Masek after it was cashed bore the single endorsement "Pay to the order of Peoples National Bank of Chicago for deposit only Machinery, Riggers & Machinery Erectors Union Local 136" (Gov't Exh. No. 50-1, Photo. 26). There was no evidence that Byrne ever knew of the check or received any part of it.

The conspiracy count of the complaint did not charge the defendant Byrne with any receipt of payment except the one by Masek on or about December 9, 1957 (App. 7). The conspiracy count, in listing other overt acts, charged Byrne in only two respects, one conversation with Koshen on October 12, 1956 and one conversation with Benson on May 21, 1956 (App. 8). No evidence was introduced to show any conversation with Benson at any time. With respect to the conversation with Koshen on October 12, 1956 the evidence was simply this:

Koshen did business in Racine, Wisconsin, and had not done any jobs in Chicago for three or four years (App. 196-197). He secured a contract with required the use of riggers in Chicago beginning October 15, 1956, and phoned the offices of Local 136 where he spoke to Fulton asking to meet the representatives of Local 136 to discuss hiring riggers (App. 179-180). At Koshen's suggestion as to time and place, Fulton accompanied by Byrne met Koshen at Aletto's Cottage on the evening of Friday, October 12, 1956 (App. 181). The three conversed about the fact that Koshen was going to do the machinery moving job for General Motors from the old plant on 110th Street in Chicago to a new plant at La Grange, Illinois and wanted Fulton and Byrne to help him to obtain as his foreman on the job Hank Peters, a member of Local 136 then working on another job (App. 182), and other employees, so he could start work on Monday, October 15, 1961. The only conversation directly involving Byrne was described by Koshen as follows (App. 181-182):

> "A. Well, it started to get late in the evening. Mr. Fulton went out to telephone.
>
> "While he was gone, I said to Mr. Byrne, I said, 'It is getting rather late.' It was getting time for

me to get home. 'I would like to know what this is all about.'

"Q. All right.

"A.' (Continuing) And Mr. Byrne said, 'Well, it is quite a big job over there,' he said. 'You know, we are poor people. That job ought to be worth $12,000.'

"Q. What did you say, if anything?

"A. I snapped it off right there, I said 'I'm afraid that we are not speaking the same language. Let's talk about something else. How did the World Series come out?'"

Government Witness Koshen did not testify to any other remarks or acts occurring in the presence of Byrne or involving Byrne. The above testimony is completely innocuous. No inference can properly be drawn that Byrne had anything improper in mind by his statement.

Koshen testified that later when Fulton had agreed to help him secure Hank Peters' release from another job so he could serve as foreman for Koshen on the new job, Koshen invited Fulton to accompany him to the men's washroom where Koshen lamented his inability to take Fulton to dinner or a ball game, and gave him $200 cash with the statement "Here take care of yourself" (App. 182). Koshen testified Fulton inquired if the money was for "all three of us" to which Koshen replied, "Yes" (App. 183). There is no evidence however that Byrne received any portion of the money or even heard that Koshen had paid Fulton anything. In addition, the payment could not possibly have been a violation of the statute because, as we point out more fully under Point 4, p. 24, *infra*, neither the defendant Byrne nor Fulton was a representative of any employee of Koshen at the time of the payment and had never been at any prior time and it was purely conjecture whether either would be at any time in the future.

But completely aside from the fact that Koshen did not employ anyone whom defendants represented, the foregoing evidence fails to establish either knowledge of any conspiracy on the part of Byrne or participation therein.

Counsel for Byrne moved for a directed verdict of acquittal in his behalf at the close of the govenment's case (App. 403) and again at the close of all the evidence. (App. 485). Both motions were denied by the trial court (App. 452, 485).

The court below in affirming the convictions despite the absence of any evidence that the defendant Byrne knew of the conspiracy, failed to follow the principles enunciated by this Court in *Ingram* v. *United States*, 360 U.S. 672, 677-681; *Direct Sales Co.* v. *United States*, 319 U.S. 703, 711; *United States* v. *Falcone*, 311 U.S. 205, 210, and its decision is in conflict with the decisions of the United States Court of Appeals for the Second[9], Fourth[10], Fifth[11], Sixth[12], Eighth [13], Ninth [14], and Tenth [15] Circuits, holding that there must be proof of knowledge of the conspiracy on the part of defendant.

---

[9] **United States v. Dubrin**, 2 Cir., 1937, 93 F. 2d 499, 503-504, certiorari denied, 303 U.S. 646.

[10] **Call v. United States**, 4th Cir., 1959, 265 F. 2d 167, 172.

[11] **Ah Ming Cheng v. United States**, 5th Cir., 1962, 300 F. 2d 202; **Duke v. United States**, 5th Cir., 1956, 233 F. 2d 897, 901-902.

[12] **Van Tress v. United States**, 6 Cir., 1923, 292 Fed. 513, 520; **Burkhart v. United States**, 6th Cir., 1926, 137 2d 841, 842.

[13] **Fulbright v. United States**, 8 Cir., 1937, 91 F. 2d 210, 213-214.

[14] **Ong Way Jong v. United States**, 9th Cir., 1957, 245 F. 2d 392, 394; **Mazurka v. United States**, 9 Cir., 1939, 100 F. 2d 958, 961-962.

[15] **Estep v. United States**, 10 Cir., 1943, 140 F. 2d 40, 45; **Jones v. United States**, 10th Cir., 1958, 251 F. 2d 288, 294.

2. As to all of the defendants, this case presents the important constitutional question of whether a defendant is denied the right of trial by jury when in a federal criminal case the trial court directs the jury to find a material issue of fact against the defendants on the ground that the evidence in the defendants' favor is insufficient to go to the jury. While the court below held that the defendants had not preserved a proper objection (see p. 12, *infra*), the record as set forth in the Statement of Facts (p. 12, *supra*) shows defendants' counsel expressly objected to the instruction, that there was no evidence the payments fell within excepted classes, on the ground this instruction constituted an invasion of the province of the jury (App. 496). While this objection was made prior to the actual charge to the jury and at the time the judge read his revised version of Government Instruction 15 to counsel, there was a stipulation that these objections would stand as objections made at the close of the giving of the charge to the jury without any necessity to restate them at the time (App. 485-486).

Despite its view that this objection had not been properly preserved, the court below proceeded to consider and reject this objection. The court below ruled "that there was no evidence which required the submission of that question to the jury" (p. 14, *infra*). We have set forth in the Statement of Facts (p. 3, *supra*) as well as in the Table appended hereto as Appendix E (p. 18a, *infra*) the extensive evidence from government witnesses and government exhibits characterizing payments to Gibas and Fulton as compensation for services performed, or in settlement of a union grievance. Subsection (c) of Section 302 of the Labor Management Act expressly excepts from the prohibited payments, in subparagraph 1, money paid as compensation for services, and in

subparagraph 2, money paid in satisfaction of a grievance. This, one of the material issues in the case was whether payments fell within the excepted classes.

This Court[16] and the United States Courts of Appeals for the Second[17], Fifth[18], and Eighth[19] Circuits have held that a court must submit all material issues of fact to a jury no matter how weak the evidence is in the defendant's favor, "for a judge may not direct a verdict of guilty no matter how conclusive the evidence"[20].

As the United States Court of Appeals for the Fifth Circuit pointed out in *Carothers* v. *United States*, 161 F. 2d 718, 722, an erroneous assumption of fact stated by a trial judge to a jury in a manner which takes a fact issue from the jury, deprives the defendant of his constitutional right to trial by jury.

We respectfully urge that the decision below is in conflict with the foregoing decision of this Court and of the United States Courts of Appeals for the Second, Fifth and Eighth Circuits and this Court should review the case to resolve the conflict.

3. The principles of due process of law as set forth by this Court in *Lambert* v. *California*, 355 U.S. 225, 227-330, require that Section 302(d) of the Labor Management Relations Act, be construed as requiring either knowledge of the law, reckless disregard of the law, bad motive or

---

[16] **Brotherhoood of Carpenters v. United States, 330 U.S. 395, 408-409.**

[17] **United States v. Hanes, 2d Cir., 1958, 256 F. 2d 561, 564.**

[18] **Carothers v. United States, 5th Cir., 1947, 161 F. 2d 718, 722.**

[19] **Dinger v. United States, 8th Cir., 1928, 28 F. 2d 548, 551.**

[20] **Brotherhood of Carpenters v. United States, 330 U.S. at 408-409.**

evil purpose, or be held unconstitutional. As applied by the courts below in this case, entirely innocent conduct was punished with long terms of imprisonment and heavy fines. Counsel for defendants requested the Court to instruct the jury that wilfully requires "the specific motive to do that which the law forbids, that is to say with evil motive or bad purpose either to disobey or to disregard the law" (App. 510). The trial court rejected this instruction and instead instructed the jury that defendants need not have had any knowledge or awareness that their act was prohibited by law (App. 530).

Defendants had a course of dealings with various small contractors engaged in essentially local enterprises to help them get more business so members of Local 136 get more employment. Local 136 had never been certified as the representative of any employees of the contractors here involved or any other employees. Local 136 operated as a local intra-state union without any awareness on the part of its officers that from time to time some of the contractors might be engaged in transactions so related to interstate commerce as to bring them within federal laws. Payments for services, advances of dues, repayment of loans, and other money transactions went on voluntarily and openly. No evil motive or bad purpose existed. For the government now to descend upon the defendants and send them to prison for their entirely innocent conduct deprives them of due process of law within the decision of this Court in *Lambert* v. *California*, 355 U.S. 225, 227-330.

This Court should grant review to clarify the meaning of the word wilfully as it is used in Section 302 (d) and overturn the unconstitutional application of that Section by the courts below.

4. In holding that Section 302 was applicable even though the defendants were not representatives at the time of the payments of any employees of the payer of the money, the decision below is in square conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Ventimiglia* v. *United States*, 1957, 242 F. 2d 620. There the court reversed a conviction under Section 302 (b) on the ground that the defendant was not at the time of the payment the representative of any of the employees of the payer (242 F. 2d at 623-624). Here the court below expressly held that the trial court properly instructed the jury that the contractor making the payment did not need to have any member of Local 136 in his employ on the specific date of the payment (p. 16, *infra*).

The language of Section 302 (b) is by its express terms only applicable when "any representative of any employees" receives money "from the employer for such employees." Since this is a criminal statute, it must be strictly construed. Only by competely ignoring the plain language of the statute can it be read as applicable to a situation such as that Koshen described, when he had not employed members of Local 136 for three or four years before the date of the payment and did not so employ them at the time (App. 196-197, 177-181, 183, 187). As shown by the record references set forth under Column 5 of Appendix E (p. 18a, *infra*), there was insufficient evidence to establish that the contractor had employees at the time of the payment as to Counts II, VI, XXVIII to XLVII, inclusive, and XLIX.

This Court should grant review to resolve the conflict between the circuits and to settle the important question of the proper meaning of Section 302 (b).

CONCLUSION.

For the foregoing reasons it is respectfully urged that this Court grant a writ of certiorari and reverse the judgment below.

RICHARD E. GORMAN
One North La Salle Street
Chicago, Illinois
Attorney for Petitioners.

APPENDIX A.

The pertinent provisions of the Labor Management Relations Act of 1948, 61 Stat. 157, 29 U.S.C. 186, as of the time of the alleged offenses here charged (all of which occurred prior to the amendment of September 14, 1959) read as follows:

"Sec. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period

of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are not neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or, in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such

written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both."

The pertinent provisions of the Federal Criminal Conspiracy Act, 62 Stat. 701, 18 U.S.C. 371, read as follows:

§371. *Conspiracy to commit offense or to defraud United States.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

APPENDIX B.

APPENDIX ORDERS ENTERED IN THE UNITED STATES DISTRICT COURT.

January 12, 1961

UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF ILLINOIS—
EASTERN DIVISION

UNITED STATES OF AMERICA,
v.
ERNEST JOSEPH GIBAS, also known as ERNIE GIBAS,
No. 58 CR 372

On this 12th day of January, 1961 came the attorney for the government and the defendant appeared in person and by his counsel and arguments in mitigation and extenuation of circumstances are heard and concluded.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Section 186(b), Title 29, United States Code, and Section 371, Title 18, United States Code (Conspiracy to violate the Taft-Hartley Act and receiving money from employees employed in an industry affecting commerce while representing said employees) as charged in Counts 1, 2, 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 16, 17, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, and 48 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year on each of 5 counts of the Indictment, that the sen-

tences imposed on counts 2, 3, 4 and 5 shall run concurrently with the sentence imposed on count 1; that the sentence imposed on count 6 shall run consecutively to and follow the sentence imposed on count 1; that the sentence imposed on count 9 shall run consecutively to and follow the sentence imposed on count 6; that the sentences imposed on counts 10, 11, 12, 13, 14, 16 and 17 shall run concurrently with the sentence imposed on count 9; that the sentence imposed on count 28 shall run consecutively to and follow the sentence imposed on count 9; that the sentences imposed on counts 29, 30, 31 and 32 shall run concurrently with the sentence imposed on count 28; that the sentence imposed on count 33 shall run consecutively to and follow the sentence imposed on count 28; that the sentences imposed on counts 34, 35, 36, 37 and 38 shall run concurrently with the sentence imposed on count 33; that the sentence imposed on count 39 shall run consecutively to and follow the sentence imposed on count 33; that the sentences imposed on counts 40, 41, 42, 43, 44, 45, 46, 47 and 48 shall run concurrently with the sentence imposed on count 39 and besides that he forfeit and pay to the United States of America a fine in the sum of One Thousand Dollars ($1,000.00) on each of counts 1, 2, 3, 6, 9, 28, 33 and 39, that said fines shall be cumulative in the sum of Eight Thousand Dollars ($8,000.00), the defendant to stand committed until the fines are paid or until he shall be otherwise discharged by due course of law.

On motion of the defendant it is Ordered that execution of sentence be and it is hereby stayed until January 19, 1961 at 12 o'clock noon at which time defendant shall surrender to the United States Marshal.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

It Is Further Ordered that the defendant's present bond shall stand as stay of execution bond.

/s/ Edwin A. Robson
United States District Judge

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF ILLINOIS—
EASTERN DIVISION

UNITED STATES OF AMERICA, v. DONALD DOWD FULTON, also known as DON FULTON,	No. 58 CR 372

On this 12th day of January, 1961 came the attorney for the government and the defendant appeared in person and by his counsel and arguments in mitigation and extenuation of circumstances are heard and concluded.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Section 186(b), Title 29, United States Code, and Section 371, Title 18, United States Code (Conspiracy to violate the Taft-Hartley Act and receiving money from employers of employees employed in an industry affecting commerce while representing said employees) as charged in counts 1, 18, 19, 20, 21, 22 and 49 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year on each of 7 counts of the Indictment, that the sentences imposed on counts 18, 19, 20, 21, 22 and 49 shall run concurrently with the sentence imposed on count 1 and besides that the defendant forfeit and pay to the United

States of America a fine in the sum of One Thousand Dollars ($1,000.00) on each of counts 1, 18 and 49, that said fines shall be cumulative in the sum of Three Thousand Dollars ($3,000.00), the defendant to stand committed until the fines are paid or until he shall be otherwise discharged by due course of law.

On motion of the defendant it is Ordered that execution of sentence be and the same is hereby stayed until January 19, 1961 at 12 o'clock noon at which time the defendant shall surrender to the United States Marshal. It Is Further Ordered that the defendant's present bond shall stand as stay of execution bond.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edwin A. Robson
United States District Judge

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF ILLINOIS—
EASTERN DIVISION

United States of America v. MICHAEL EMMETT BYRNE, also known as MIKE BYRNE,	No. 58 CR 372

On this 12th day of January, 1961 came the attorney for the government and the defendant appeared in person and by his counsel and arguments in mitigation and extenuation of circumstances are heard and concluded.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of Section 186 (b), Title 29, United States Code, and Section 371, Title 18, United States Code (Conspiracy to violate the Taft-Hartley Act and receiving money from employers of employees employed in an industry affecting commerce while representing said employees) as charged in counts 1 and 50 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown on appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney eneral or his authorized representative for imprisonment for a period of One (1) Year on each of 2 counts, that the sentence imposed on count 50 shall run concurrently with the sentence imposed on count 1 and besides that he forfeit and pay to the United States of America a fine in the sum of One Thousand Dollars ($1,000.00) on each of said counts, that the payment of the fine imposed on count 1 shall stand as pay-

ment of the fine imposed on count 50, the defendant to stand committed until the fine is paid or until he shall be otherwise discharged by due course of law.

On motion of the defendant it is Ordered that execution of sentence be and the same is hereby stayed until January 19, 1961 at 12 o'clock noon at which time the defendant shall surrender to the United States Marshal. It Is Further Ordered that the defendant's present bond shall stand as stay of execution bond.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edwin A. Robson
United States District Judge

APPENDIX C.

OPINION OF COURT OF APPEALS.

Filed March 19, 1962.

In The
UNITED STATES COURT OF APPEALS.
For The Seventh Circuit

SEPTEMBER TERM, 1961—JANUARY SESSION, 1962

No. 13313

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ERNEST JOSEPH GIBAS, DONALD DOWD FULTON and MICHAEL EMMETT BYRNE,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

March 19, 1962

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

CASTLE, *Circuit Judge.* Ernest Joseph Gibas, Donald Dowd Fulton and Michael Emmett Byrne, defendants-appellants, were charged in a multiple count indictment with conspiracy[1] to violate 29 U.S.C.A. §186(b)[2] and charged with substantive violations of that section.

[1] Conspiracy is charged in violation of 18 U.S.C.A. §371.

[2] §302(b) of the Labor Management Relations Act, 1947, which provided: "(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value".

The first count of the indictment charged, in substance, a conspiracy between Gibas, business manager and financial secretary-treasurer of Machinery Movers, Riggers and Machinery Erectors, Local Union 136, Fulton and Byrne, business representatives of the Local, Michael Roy Tagney, its president until his death, and others whose names are unknown, to unlawfully receive and accept, and to unlawfully agree to receive and accept, money from contractors employing members of Local 136 in an industry affecting commerce. Each of the substantive counts identified the contractor-employer, alleged the interstate character of his business and that certain of his employees were members of Local 136, alleged the defendant named therein was a representative and official of Local 136 and on a specified date received and accepted a specific sum of money from the contractor-employer in violation of §186 (b).

The case was tried to a jury. All three defendants were convicted on the first count charging conspiracy. The defendant Gibas was found guilty and convicted on thirty-four of the substantive counts. Fulton was convicted on the six substantive counts in which he was named, and Byrne was convicted on the one substantive count naming him. Gibas was sentenced to imprisonment for a total of six years and the payment of fines totaling $8000.00; Fulton to imprisonment for one year and the payment of fines totalling $3000.00; and Byrne was sentenced to imprisonment for one year and the payment of a fine of $1000.00. All three defendants appealed.

The contested issues presented by defendants' appeal are:

(1) Did the District Court commit reversible error in instructions given or in the refusal to give instructions tendered by defendants?

(2) Did prejudicial newspaper publicity during the trial deprive defendants of a trial by an impartial jury?

(3) Was there sufficient proof of interstate commerce; and, with respect to certain of the counts, of employment of members of Local 136 by the particular contractor; and of Byrne's participation in the conspiracy and receipt of a payment?

We have carefully reviewed the record but we do not deem it necessary to disposition of the issues and consideration of the contentions made by defendants that we understake to summarize the evidence as it ars on each defendant or in connection with the m , transactions involved. Pertinent facts, in so far as the general picture reflected by the record is concerned, include the following. The various contractor-employers are engaged in the machinery moving business. They do not maintain large staffs but rely on Local 136's hiring hall to furnish them with such additional employees or riggers as are needed for the movement, dismantling or erection of machinery in connection with a particular job or contract. Members of Local 136, represented by defendants, are supplied for this purpose but sometimes if members are not available to fill a request non-members, who have registered at the hiring hall, are supplied. Activities of the contractor-employers named in counts under which convictions resulted concerned, in each instance, the pick-up of machinery in Illinois for delivery to locations outside of Illinois, and the pick-up and delivery in Illinois of machinery shipped to Illinois from other places. The percentage of the total business of each which involved such interstate aspects varied but in one instance was estimated to be eighty per cent of the total, in another sixty to eighty percent, and in the others from five to twenty-five percent.

The defendants contend that the District Court erred in instructing the jury that there was no evidence presented indicating that any of the payments made by any employer

came within the exceptions to §186(b).[3] Not only was no proper objection made to the instruction but from our examination of the record references relied upon by the defendants in this connection we are in complete agreement with the trial judge that there was no evidence which required the submission of that question to the jury. The government's witnesses, in testifying to statements made by a defendant, in some instances repeated the label the defendant had used to characterize a payment—such as "fine", "commission" or "payment for an interest" of the union representative in the contractor's business. But there was no testimony or other evidence of any probative value

---

[3] The exceptions to §186(b) are set forth in 29 U.S.C.A. §186(c), (§302(c) of the Labor Management Relations Act, 1947) which in so far as here pertinent provides:

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees or other employers making similar payments, and their families and dependents): . . . ."

to indicate that any of the payments so described fell within any of the exceptions. And, with respect to the payments referred to as "dues" it was admitted by the witness that no written assignment of the employee authorizing such payments existed. We perceive no error in the court's instructions pertaining to the matter of exceptions to the prohibition of §186(b). It was within the province of the court to so comment on the evidence (*Quercia* v. *United States*, 289 U.S. 466, 468-470) and, on the facts here involved, to submit these irrelevant issue to the jury was wholly unnecessary and could have been confusing.

The testimony of the contractor-employers was sufficient to establish that the members of Local 136 working for them were employed in an industry affecting interstate commerce. *United States* v. *Pecora*, 3 Cir., 267 F. 2d 512; *Cone Bros. Contracting Company* v. *Bricklayers, Masons, etc.*, 5 Cir., 263 F. 2d 297; *United States* v. *Floyd*, 7 Cir., 228 F.2d 913. And, the trial court did not err in instructing the jury that:

> "If you believe the testimony of the Government's witnesses concerning the pick-up of machinery in Illinois for delivery to locations outside of Illinois, and the pick-up and delivery in Illinois of machinery that was shipped to Illinois from places outside of Illinois, the employees of said employers were engaged in an industry affecting commerce".

The defendants' contentions that the court erred in giving this instruction and rejecting a tendered instruction on the subject are without merit.

Defendants urge that the District Court committed reversible error in refusing an instruction tendered by defendants to the effect that the government was required to prove that the receipt of the payments by the defendants was "with an evil or bad purpose". It was not error to refuse to so instruct. *Korholz* v. *United States*, 10 Cir., 269 F. 2d 897, 903. And, defendants' reliance upon *United States* v. *Inciso*, 7 Cir., 292 F. 2d 374, in this connection, is wholly misplaced. In *Inciso*, Chief Judge Hastings, in

sustaining the admissibility of certain evidence as both a false exculpatory statement and as proof of defendant's awareness of the prohibitions of §186(b) and (d) stated "[w]e hold that the term 'wilfully violates' in Section 186(d) contemplates proof of awareness of the restrictions of that section or a reckless disregard for that section." But there is nothing in the rationale of *Inciso* to indicate it holds that the receipt must be with an evil or bad purpose. Moreover, defendants made no objection to the propriety of the instruction the court did give in so far as its statement of the knowledge element was concerned.

In view of the hiring custom shown by the record—the use by the contractor-employers of Local 136's hiring hall as the source of employees and riggers as needed, and the continuity of the Local as such source for the supply of workmen, albeit a revolving of employers in so far as the individual employee may be concerned—we find no merit in defendants' arguments that it was error to instruct that the contractor-employer making the payment to defendants did not need to have a member of the Local in his employ on the specific date of the payment and that it was error not to direct a verdict of acquittal on counts where the proof did not establish that the contractor-employer had at least two employees who were members of Local 136 at the time of the payment involved. *United States* v. *Pecora*, 3 Cir., 267 F. 2d 512, 514.

After the submission of evidence was closed but before the case was submitted to the jury there appeared, over the week-end, two newspaper articles in metropolitan dailies which contained references, stricken from exhibits which had been offered in evidence at the trial, which an office employee of one of the contractor-employers had entered on the employer's records, describing certain of the payments to the defendants as "Union graft" and as made to "Gestapo". When the articles were called to the attention of the trial judge he interrogated the jurors as to whether any of them had read the articles. None of them had done

so, and two who had seen the headline* of the article, but did not read the article, stated that they were not in any way prejudiced thereby. The court properly denied defendants' motion for a mistrial based on the newspaper publicity. A motion of this character is addressed to the sound discretion of the court. Under the circumstances here there was no abuse of discretion. *United States* v. *Carruthers*, 7 Cir., 152 F. 2d 512, 518-519. No prejudice was "manifest". *Cf. Irvin* v. *Dowd*, 366 U.S. 717, 723-724.

On the issue of the sufficiency of the evidence to warrant submission of the case to the jury and to sustain the convictions we must view the evidence in the light most favorable to the government. It is not for us to weigh the evidence nor reject inferences properly deducible therefrom. *Glasser* v. *United States*, 315 U.S. 60; *United States* v. *Coduto*, 7 Cir., 284 F. 2d 464; *United States* v. *Guido*, 7 Cir., 251 F. 2d 1; *United States* v. *Pinna*, 7 Cir., 229 F. 2d 216. From our study of the record we are convinced as to the sufficiency of the evidence to sustain the convictions of defendants Gibas and Fulton and to sustain the conviction of defendant Byrne on the conspiracy count. Inasmuch as the sentences imposed on Byrne are concurrent and the payment of the fine imposed on the conspiracy count is to "stand as payment of the fine imposed on count 50" we find it unnecessary to consider the contention that there is no evidence that Byrne received the payment referred to in count 50. Where conviction on one count of an indictment is sustained it becomes unnecessary to consider any other on which the sentence is concurrent with the first. *United States* v. *Cioffi*, 2 Cir., 253 F. 2d 494, 496.

Although we have not commented on all of the arguments advanced by defendants we have, in arriving at the disposition we make of the case, considered each of those arguments and the authorities relied upon to support them. We are not persuaded that they possess merit. It is our conclusion that the judgment orders of the District Court should be affirmed.

AFFIRMED.

---

*The headline was "COURT IS TOLD OF SHAKEDOWN BY UNION BRASS".

APPENDIX D.

JUDGMENT OF THE COURT OF APPEALS

Filed March 19, 1962

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Monday, March 19, 1962

Before

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Wm G. Knoch, Circuit Judge

Hon. Latham Castle, Circuit Judge

UNITED STATES OF AMERICA, *Plaintiff-Appellee* vs. ERNEST JOSEPH GIBAS, DONALD DOWD FULTON and MICHAEL EMMETT BYRNE, *Defendants-Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 13313	

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX E

Compilation Showing as to Each Defendant Evidence Respecting Purpose of Alleged Payment and Number of Members of Local 136 Employed at Time as Pertinent to Each Substantive Count (counts are bracketed where sentences of imprisonment are concurrent; each count for which a fine is imposed appears in bold face type).

Gibas

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members of Local 136 at time of payments	Mentioned in Count I as overt act in conspiracy
II App. 8-9	Marshall Rodseth Trueking Co.	11-1-53	Fine, App. 155, 163-165	App. 162	Par. 8, App. 7
III App. 9-10	J. A. Ross and Company	6-19-53	Commission for securing job, App. 120, 122-123, 130-131, 134, 141		
IV App. 10-11	J. A. Ross and Company	7-18-53	Commission for securing job, App. 120, 122-123, 130-131, 134, 141		
V App. 11-12	J. A. Ross and Company	8-21-53	Commission for securing job, App. 120, 122-123, 130-131, 134, 141		Par. 2, App. 6

APPENDIX E
Gibas (cont'd)

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members of Local 136 at time of payments	Mentioned in Count I as overt act in conspiracy
VI App. 12-13	Helders Motor Service Company	3-5-57		App. 203, 208	Par. 15, App. 7-8
IX App. 16-17	Leonard Gorter d/b/a Standard Cartage Company	5-2-55			
X App. 17-18	Leonard Gorter d/b/a Standard Cartage Company	11-1-55			
XI App. 18-19	Leonard Gorter d/b/a Standard Cartage Company	12-7-55	Payment to union for permits and wages to Gibas, App. 310-315		
XII App. 19-20	Leonard Gorter d/b/a Standard Cartage Company	12-7-55			
XIII App. 20-22	Leonard Gorter d/b/a Standard Cartage Company	2-1-56			
XIV App. 22-23	Leonard Gorter d/b/a Standard Cartage Company	7-3-56			

APPENDIX E
Gibas (cont'd)

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members of Local 136 at time of payments	Mentioned in Count I as overt act in conspiracy
XVI App. 24-25	Leonard Gorter d/b/a Standard Cartage Company	9-24-57	"Union Assoc. Dues" Gov't Exh. No. 16-2A. Photo. 111, 342, 392-393		
XVII App. 25-26	Leonard Gorter d/b/a Standard Cartage Company	12-26-57	"Union Assoc. Dues" Gov't Exh. No. 7-2, Photo. 60, App. 331-332, 392		Par. 6, App. 7
XXVIII App. 38-39	William N. Tucker d/b/a M. Lange	11-18-53	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXIX App. 39-40	William N. Tucker d/b/a M. Lange	11-18-53	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXX App. 40-41	William N. Tucker d/b/a M. Lange	2-6-54	Payment for buying out business interest, App. 76-80, 84	App. 97-98	

APPENDIX E

Gibas (cont'd)

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members of Local 136 at time of payments	Mentioned in Count I as overt act in conspiracy
XXXI App. 42-43	William N. Tucker d/b/a M. Lange	5-3-54	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXXII App. 43-44	William N. Tucker d/b/a M. Lange	5-11-54	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXXIII App. 44-45	M. Lange, Inc.	9-7-55	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXXIV App. 45-46	M. Lange, Inc.	11-18-55	Payment for buying out business interest, App. 76-80, 84	App. 97-98	Par. 14, App. 7
XXV App. 46-47	M. Lange, Inc.	2-2-56	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXXVI App. 48-49	M. Lange, Inc.	4-8-56	Payment for buying out business interest, App. 76-80, 84	App. 97-98	

APPENDIX E
Gibas (cont'd)

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members of Local 136 at time of payments	Mentioned in Count I as overt act in conspiracy
XXXVII App. 49-50	M. Lange, Inc.	7-17-56	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXXVIII App. 50-51	M. Lange, Inc.	3-3-57	Payment for buying out business interest, App. 76-80, 84	App. 97-98	
XXXIX App. 51-52	Frank Masek d/b/a F. Masek Machinery Movers	7-2-53	Commission, Gov't Exh. No. 39-2, Photo. 15, App. 248, 249	App. 239-240	
XL App. 52-53	Frank Masek d/b/a F. Masek Machinery Movers	2-1-54	Commission on Drury Lane Job, Gov't Exh. No. 40-2, Photo 16, App. 248-249	App. 239-240	
XLI App. 53-54	Frank Masek d/b/a F. Masek Machinery Movers	2-4-54	Commission on Hebol Job, Gov't Exh. No. 41-2, Photo. 17, App. 251	App. 239-240	

APPENDIX E

Gibas (cont'd)

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members who were members 136 at time of payments	Count I as overt act in conspiracy
XLII App. 55-56	Frank Masek d/b/a F. Masek Machinery Movers	5-14-54	Commission, Gov't Exh. No. 42-2, Photo. 18, App. 250-251	App. 239-240	
XLIII App. 56-57	Frank Masek d/b/a F. Masek Machinery Movers	5-14-54	Commission, Gov't Exh. No. 43-2, Photo. 19, App. 250	App. 239-240	
XLIV App. 57-58	Frank Masek d/b/a F. Masek Machinery Movers	1-27-55	Transmittal to Local 136 of dues money loaned to Foreman Newman, Gov't Exh. No. 44-2, Photo. 20, App. 257-258, 249-250	App. 239-240	
XLV App. 58-59	Frank Masek d/b/a F. Masek Machinery Movers	2-24-55	Transmittal to Local 136 of dues money loaned to Foreman Newman, Gov't Exh. No. 45-2, Photo. 21, App. 257-258, 249-250	App. 239-240	Par. 9, App. 7

APPENDIX E
Gibas (cont'd)

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members of Local 136 at time of payments	Mentioned in Count I as overt act in conspiracy
XLVI App. 59-60	Frank Masek d/b/a F. Masek Machinery Movers	3-3-55	Transmittal to Local 136 of dues money loaned to Foreman Newman, Gov't Exh. No. 46-2, Photo. 22, App. 249-250, 257-258	App. 239-240	
XLVII App. 60-61	Frank Masek d/b/a F. Masek Machinery Movers	9-14-55	Commission on Buffalo, New York job, Gov't Exh. No. 47-1, Photo. 23, App. 252, 249-250	App. 239-240	
XLVIII	Frank Masek d/b/a F. Masek Machinery Movers	3-5-57	Transmittal to Local 136 of dues money loaned to Foreman Newman and Employee Lesco, Gov't Exh. No. 48-2, Photo 24, App. 256-257		

APPENDIX E

Fulton

Count Number	Name of Employer	Date of Payment	Purpose of Payment	Absence of Employees who were members of Local 136 at time of payments	Mentioned in Count I as overt act in conspiracy
XVIII App. 26-27	Leonard Gorter d/b/a Standard Cartage Company	6-4-56			
XIX App. 28-29	Leonard Gorter d/b/a Standard Cartage Company	3-6-57			
XX App. 28-29	Leonard Gorter d/b/a Standard Cartage Company	4-9-57			
XXI App. 30-31	Leonard Gorter d/b/a Standard Cartage Company	5-1-57			
XXII App. 31-32	Leonard Gorter d/b/a Standard Cartage Company	6-25-57			
XLIX App. 63-64	Frank Masek d/b/a F. Masek Machinery Movers	4-6-54	Commission on Hebol Job, Gov't Exh. No. 49-2, Photo. 25, App. 223, 253-254	App. 239-240	

Byrne

L App. 64-65	Frank Masek d/b/a F. Masek Machinery Movers	12-9-57	In settlement of union grievance, App. 223-225		Par. 10, App. 7

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	6
1. The conspiracy	7
2. The substantive offenses	9
Argument	10
Conclusion	16

CITATIONS

Cases:

Bianchi v. *United States*, 219 F. 2d 182, certiorari denied, 349 U.S. 915	13
Brennan v. *United States*, 240 F. 2d 253, certiorari denied, 353 U.S. 931	14
Callanan v. *United States*, 223 F. 2d 171, certiorari denied, 350 U.S. 862	13
Delli Paoli v. *United States*, 352 U.S. 232	10-11
Glasser v. *United States*, 315 U.S. 60	10
Hirabayashi v. *United States*, 320 U.S. 81	10
Ingram v. *United States*, 360 U.S. 672	10
Korholz v. *United States*, 269 F. 2d 897, certiorari denied, 361 U.S. 929	14
Lambert v. *California*, 355 U.S. 225	14
Lawn v. *United States*, 355 U.S. 339	10
Pinkerton v. *United States*, 328 U.S. 640	10
United States v. *Falcone*, 311 U.S. 205	10
United States v. *Gross*, 286 F. 2d 59, certiorari denied, 366 U.S. 935	13
United States v. *Pecora*, 267 F. 2d 512	15
United States v. *Ryan*, 350 U.S. 299	14, 15
Ventimiglia v. *United States*, 242 F. 2d 620	15

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 185

ERNEST JOSEPH GIBAS, DONALD DOWD FULTON AND MICHAEL EMMETT BYRNE, PETITIONERS,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 10a-16a) is reported at 300 F. 2d 836.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1962 (Pet. App. 17a). A petition for a rehearing was denied on April 17, 1962. On May 14, 1962, an order by MR. JUSTICE CLARK extended the time for filing a petition for a writ of certiorari to and in-

cluding June 16, 1962, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the conviction of petitioner Bryne as a labor union representative for conspiracy to accept money unlawfully from contractors employing union laborers in an industry affecting interstate commerce.

2. Whether the trial court properly instructed that there was no evidence that any payment made by an employer came within any of the five statutory exceptions listed in Section 302(c) of the Labor Management Relations Act of 1948.

3. Whether the court properly instructed that the word "willfully" under Section 302(d) of the Act means knowingly and intentionally committing acts constituting the offenses charged without requiring knowledge that such acts are in fact prohibited by law.

4. Whether the court properly instructed that there could be a violation of Section 302(b) of the Act without proof that the employers had employees who were union members at the moment of receipt of the money, if the employers, in the course of their business, regularly employed men who were union members.

STATUTES INVOLVED

The Labor Management Relations Act of 1947, 61 Stat. 136, 157, 29 U.S.C. 141, *et seq.*, as of the time of the offenses charged, provided as follows:

Restrictions on Payments to Employee Representatives

Sec. 302 [29 U.S.C. 186]. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or

commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the

representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

* * * * *

18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Count I of an indictment returned in the United States District Court for the Northern District of Illinois charged a conspiracy between petitioner Gibas, business manager and financial secretary-treasurer of Machinery Movers, Riggers and Machinery Erectors, Local Union 136 (hereinafter called Local 136), petitioners Fulton and Byrne, business representatives of Local 136, and unknown persons, unlawfully to receive and accept, and agree to receive and accept, money from contractors employing members of Local 136 in an industry affecting interstate commerce (R. 3-8). Each substantive count alleged that a named contractor-employer was engaged in interstate commerce; that certain of his employees were members of Local 136; and that the defendant named therein was a representative and official of Local 136, who on a specified date received and accepted a specific sum of money

from the contractor-employer in violation of 29 U.S.C. 186(b) (supra, p. 3) (R. 8-65). All three petitioners were found guilty by the jury on the conspiracy count; Gibas was found guilty on Counts II through VI, IX through XIV, XVI, XVII, and XXVIII through XLVIII; Fulton was found guilty on Counts XVIII through XXII and on Count XLIX; and Byrne was found guilty on Count L (R. 538). Gibas was sentenced to imprisonment for a total of six years and fines of $8,000 (R. 557-558); Fulton to one year and fines of $3,000 (R. 559-560); and Byrne to one year and a $1,000 fine (R. 561-562). On appeal by all three petitioners (R. 563-564), the convictions were affirmed (Pet. App. 17a).

1. *The conspiracy*—The evidence relates to a number of contractor-employers engaged in the business of moving heavy machinery, some involving the pick-up of machinery in Illinois for delivery to locations outside to Illinois, and others for delivery in Illinois of machinery shipped to Illinois from other places (R. 72, 73, 115, 150, 151, 202, 212, 213, 214, 301, 302). The employers had some employees who were members of Local 136 (R. 73, 115, 151, 203, 214, 302). The employers would call the hiring hall of Local 136 for workers on particular jobs. Union men would be sent except that sometimes non-union men registered at the hiring hall would be supplied when there were not enough union men available (R. 74, 116, 152, 214, 302, 475).

Employer Tucker was the president of M. Lange, Incorporated (R. 72) and had engaged in the business of moving machinery since 1953 (R. 74). Tagney,

then president of Local 136 (who died in August 1953), had made a loan to Tucker for the purchase of a winch, which Tucker had repaid in 30 days (R. 4, 103-104). In regard to a $1,000 payment Tucker made to Tagney in 1953 (R. 73-76), Tucker gave the following testimony (R. 76-77):

> A. Well, Mr. Tagney offered to sell his interest in the business [Tucker's] for $1,000. Of course, he never had any interest, as far as that was concerned, but I went along with it.
>
> Q. What did you say to his offer to sell the interest in the business for $1,000?
>
> A. I gave him the money.
>
> Q. Was anything said at that time and place about future payments of money?
>
> * * * * *
>
> A. Only until after I had given him the $1,000. Then it was supposed to be $30.00 a month payments.

After Tagney's death, Gibas told Tucker that he knew of his dealings with Tagney and that thereafter the "payments were going to go from $30.00 to $50.00 a month" (R. 84).

Employer Ross stated that shortly before August 31, 1953 Gibas told him that he would be out for the normal check and also wanted the thousand dollars under the agreement Ross had with Tagney. Ross testified, "The agreement that I had with Mr. Tagney at the time that I began hiring machinery movers was

that I would have to pay him a thousand dollars on them plus five cents an hour for each machinery mover that worked, plus a thousand dollars if I received the second contract in August" (R. 122-123). Employer Gorter testified that he had been introduced to Gibas by Tagney who said that "Mr. Gibas would take over after this" (R. 304). Gorter thereafter made payments to Gibas (R. 306).

On October 12, 1956, employer Koshen, at dinner with Fulton and Byrne, discussed the hiring of men from Local 136 for a General Motors job. Fulton had said he was not too favorable to letting Koshen have any men (R. 179, 181). While Fulton had left the table to telephone, Byrne said to Koshen, "Well, it is quite a big job over there. You know, we are poor people. That job ought to be worth $12,000." Koshen said they were not speaking the same language and changed the conversation (R. 181-182). When Fulton went into the restroom with Koshen, Koshen gave him $200 and said, "Here, take care of yourself." Fulton asked, "Is that for all three of us?" and Koshen replied, "Yes, sir." On the following Monday, Koshen got the men he needed for the job (R. 182-183).

2. *The substantive offenses*—The evidence showed payments to Gibas to get men on the job by contractor-employers Rodseth (R. 156-157), Ross (R. 121-122, 131, 134), Helders (R. 203-204), Gorter (R. 305, 306, 310, 327-332), Tucker (R. 78, 85-89) and Masek (R. 218-222). It also disclosed similar payments to Fulton by contractor-employers Gorter (R. 332-334) and Masek (R. 223).

As to Count L charging an illegal payment to Byrne (R. 64-65), the evidence showed that Byrne telephoned Masek and said that he was working short-handed on the Mall Tool job and would have to get more men on it. Masek told Byrne that he would see Gibas and straighten the matter out with him. Masek gave Gibas a $100 check payable to cash dated December 10, 1957 (Gov. Ex. 50-1, R. 223-225). The endorsement on the check showed that it was deposited to the credit of Local 136 (R. 254, 255). The check stub (Gov. Ex. 50-2) and the memorandum to a tax consultant (Gov. Ex. 50-3) referred to "comm. on Mall Tool job" for "Mike Burns."

ARGUMENT

1. There is no merit to petitioner Byrne's contention that the evidence was insufficient to support his conviction on the conspiracy count (Pet. 16-20). Since the court below found the conspiracy evidence sufficient, it properly affirmed on that count alone without finding it necessary to consider the sufficiency of the evidence on the substantive count L. See *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1; *Lawn* v. *United States*, 355 U.S. 339, 359.

This is not a case like *Ingram* v. *United States*, 360 U.S. 672, or *United States* v. *Falcone*, 311 U.S. 205, in which some defendants were held not guilty of conspiracy because they did not have knowledge of its purpose. Here there was sufficient evidence of Byrne's participation in the conspiracy from which the jury could reasonably infer his knowledge. Cf. *Glasser* v. *United States*, 315 U.S. 60, 80; *Delli Paoli* v. *United*

States, 352 U.S. 232, 236. Byrne's knowledge could be inferred both from the incident of October 12, 1956, involving Koshen, and from the Masek check dated December 10, 1957, which was also the subject of Count L (see Statement, *supra*, pp. 9-10).

After Koshen was led to believe it was going to be difficult for him to get men, Byrne virtually invited him to make an illegal payment with the statement, "Well, it is quite a big job over there. You know, we are poor people. That job ought to be worth $12,000" (R. 182). Use of the word "we" indicated that Byrne was in the conspiracy together with Fulton and Gibas. And when, shortly after Byrne's invitation, Koshen made the $200 payment to Fulton in the restroom, Koshen indicated that the payment was for "all three" of the conspirators. In the other incident involving the $100 Masek check dated December 10, 1957, it was Byrne who telephoned Masek that he would have to get more men on the Mall Tool job, after which Masek "straightened it out" with Gibas, as he told Byrne he would, by delivering the check to Gibas. It was not an unreasonable inference that Byrne obtained the proceeds from this check by having it channeled through Local 136. At the very least, this incident shows a sufficient dovetailing of the activities of Byrne and Gibas to justify the jury's conclusion that Byrne was actively assisting in the scheme for obtaining improper payments from employers.

2. The judge refused to submit to the jury, as requested by petitioners, the issue of whether the payments charged in the indictment fell within any of the five statutory exceptions in Section 203(c) (*supra*, p. 3).

In explaining the statute the judge mentioned the exceptions and told the jury (R. 525-526):

> There was no evidence presented at this trial indicating that any payment made by any employer was of the nature of any of said statutory exceptions.

Petitioner argued that this was not a matter of law to be ruled on by the Court (R. 496).[1]

The statement of the judge was, however, factually correct. Petitioners base their argument on the fact that a number of the checks introduced in evidence bore on their face a purported statement of purpose, such as "commission for securing job" or "payment for permit" (See Pet. App. E). But in each instance, the government's evidence had specifically shown that the check was in fact simply a payment to the defendant named, and petitioners offered no evidence of any kind to substantiate the notation on the check. Moreover, even taking the notations at face value, they do not fall within the exceptions of Section 302(c). As to the alleged "commissions" (Counts III-V, XLIX, Pet. App. 18a, 25a), there was nothing to show that they were for "services as an employee of such employer" within the first exception to Section 302, the only one under which they might conceivably fall. As to the notations reciting "payment for buying out business interest" on Tucker's checks (Counts XXVII-XXXVIII, Pet. App. 20a-22a), besides the lack of evi-

[1] We do not argue that this was inadequate to preserve an exception.

dence showing an initial sale of the business by Gibas to Tucker, there was certainly no evidence that the alleged resale was made "at the prevailing market price in the regular course of business" under the third exception set out in Section 302(c). The claim that certain payments were for union dues (Counts XVI, XVII, Pet. App. 20a; XLIV, XLVIII, Pet. App. 23a-24a) does not show an exception under subdivision (4) since there was no evidence that the required written authorization from any employees to deduct union dues had been obtained. Nor do the alleged "fine" (Count II, Pet. App. 18a) or the alleged "settlement of union grievance" (Count L, Pet. App. 25a) satisfy the second exception which requires proof of a settlement in the absence of fraud or duress, the only proof here being of duress. Thus, the notations on the checks in themselves were not even slight evidence that the payments in this case fell within the statutory exceptions, and since this was the only proof possibly pointing in that direction, the judge properly told the jury that there was no evidence that the payments fell within the statutory exceptions. A judge is not required to submit to the jury a theory which has no evidence to support it. E.g., *United States* v. *Gross*, 286 F. 2d 59, 61 (C.A. 2), certiorari denied, 366 U.S. 935; *Bianchi* v. *United States*, 219 F. 2d 182, 192-193 (C.A. 8), certiorari denied, 349 U.S. 915; *Callanan* v. *United States*, 223 F. 2d 171, 176-177 (C.A. 8), certiorari denied, 350 U.S. 862.

3. Contrary to petitioner's contention (Pet. 22-23), the court properly instructed the jury that the word "willfully" under Section 302(d) of the Act required a finding that petitioners knowingly and intentionally

made the payments charged, and that it was not necessary that they have knowledge that such acts were in fact prohibited by law (R. 530-531).

This court in *United States* v. *Ryan*, 350 U.S. 299, 305, observed as to Section 302, "As the statute reads, it appears to be a criminal provision, *malum prohibitum*, which outlaws all payments, with stated exceptions, between employer and representative." Instructions similar to those given here have been upheld. *E.g.*, *Brennan* v. *United States*, 240 F. 2d 253, 265 (C.A. 8), certiorari denied, 353 U.S. 931; *Korholz* v. *United States*, 269 F. 2d 897 (C.A. 10), certiorari denied, 361 U.S. 929.[2]

4. Petitioners point to certain isolated instances in which it was not specifically shown that at the exact time of payment the employer then had employees who were members of Local 136. They say (Pet. 24) the count erred in instructing that it was unimportant whether the various companies had employees who were union members at the precise moment of receipt of the money, but that it was sufficient if in the employers' course of business they regularly employed members of Local 136 (R. 527).

The instruction is in keeping with the central pur-

---

[2] *Lambert* v. *California*, 355 U.S. 225, striking down as a violation of the 14th Amendment a Los Angeles ordinance making it an offense for a convicted felon to remain in the city more than five days without registration with the police where the accused had no knowledge of the duty to register, is not in point. Unlike *Lambert*, where the accused had no knowledge of the violation and her conduct was merely passive failure to register, here the jury was required to find that the petitioners knowingly and intentionally made the illegal payments forming the basis of their convictions.

pose of the statute—to keep the processes of collective bargaining unsullied by special dealings. See *United States* v. *Ryan*, 350 U.S. 299. Section 302(b) is violated if money is paid by an employer to a representative of employees shown to have been employed by the employer during the span of time covered by the indictment. There is no requirement, express or implied, that the employer must have employees working for him at the precise moment of payment. An instruction of similar import was approved in *United States* v. *Pecora*, 267 F. 2d 512, 514 (C.A. 3), where it appeared that workers on a highway project were not working on the particular date of the prescribed payment but that their employment had not been permanently terminated. Here, there was ample evidence that during the general period covering payments to petitioners the various employers had numerous employees who were members of Local 136 (R. 73, 115, 151, 203, 214, 302).[3]

---

[3] Petitioner's reliance upon *Ventimiglia* v. *United States*, 242 F. 2d 620 (C.A. 4) is misplaced. In *Ventimiglia* the basis for reversal of the conviction for conspiracy to violate Section 302(a) of the Act was the fact that the union business agent to whom unlawful payments were made was not a representative of the defendants' non-union employees. In the instant case, however, petitioners were bona fide representatives of union employees of the various employer-contractors.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1962.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1962 647083 15